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CASES AND REGULATIONS REFERRED TO.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

JOHN MILLER, APPELLANT,
v.
THE UNITED STATES.
No. 178.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF CASE.

In the above-entitled cause the petitioner and appellant, John Miller, a subcontractor, brought an action in the Court of Claims on an alleged breach of contract.

John Miller, the appellant, was surety on a contract executed by John R. Crittenden with the Postmaster General, dated February 1, 1906, for a term of four years, the purpose of which contract was the carrying of mail from Valdez to Eagle and other points in the Territory of Alaska. Crittenden was unable to carry out the contract, and on May 1, 1908, with the consent of the Postmaster General, sublet the contract to appellant.

On August 11, 1908, the Postmaster General ordered that on and after September 30, 1908, further mail service under the contract should be discontinued, with an allowance of one month's pay to the contractor.

Appellant concludes his petition with the statement that he was damaged as follows: (1) Loss of profits which would have accrued during the remainder of the contract period, $40,936; (2) losses incident to the erection of buildings and purchase of horse feed, $10,800; making in the aggregate $51,736, for which amount judgment was prayed.

Appellee demurred to the complaint on the ground that the same did not state a cause of action.

The demurrer was sustained. The opinion of the court below is found in 47 Court of Claims Reports, page 146.

CONTENTS OF PETITION.

It will be necessary in the following digest of the petition to include some matters which we believe have no place therein. It alleges in substance:

1. That on September 15, 1905, the United States advertised for proposals to carry the mails from Valdez to Eagle and certain other places in the Territory of Alaska, the names of which and also the schedules, etc., appear in said advertisement.

2. That John R. Crittenden submitted a proposal under said advertisement for carrying the mails on said route, which was known and described as route No. 78108, for the sum of $46,000 per annum.

3. That the proposal of said Crittenden was accepted, and on February 1, 1906, he entered into a contract with the Government, through and by the Postmaster General, for transporting the mails as aforesaid for and during the term of four years, beginning July 1, 1906, and ending June 30, 1910. He executed his bond, with the petitioner, John Miller, and one Charles H. Kraemer, residents of Alaska, as sureties thereon, for the faithful performance of his duties, which bond was duly approved.

4. That by the terms of said contract it was stipulated by the contractor and his sureties that the Postmaster General *might discontinue* or extend said contract, change the schedules, change the termini of the route, and alter, *increase*, *decrease*, or extend the service in accordance with law, etc., and *in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor there should be allowed one month's extra pay on the amount of service dispensed with*, and not to exceed a *pro rata* compensation for the service retained, but no increase of compensation should be allowed for a change of service not amounting to an increase, nor indemnity of one month's pay for any change of service not involving a decrease of service.

5. That the regulations of the Post Office Department in force at the time of the execution of said contract and during the term thereof provided that *the Postmaster General might discontinue or curtail the service on any mail route, in whole or in part*, in order to place on the route superior service, or whenever

the public interests, in his judgment, should require such discontinuance or curtailment for any cause, he *allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with* and a pro rata compensation for the amount of service retained and continued.

6. That the regulations of the Post Office Department were not drawn with reference to the conditions existing in Alaska on route No. 78108, during the period covered by the contract, but were drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of said route in Alaska.

7. That the original contractor, Crittenden, was unable to command the capital necessary in the performance of the contract, and the petitioner was obliged to furnish large sums of money incident to the transportation of the mails under said contract.

8. That on May 1, 1908, the petitioner, with the written consent of the Postmaster General, entered into a contract with the original contractor, Crittenden, whereby he assumed all the obligations of the said contractor for conveying the mails on said route, subject to all the requirements of said contractor under his contract with the United States.

9. That on August 11, 1908, the Postmaster General decided, and *the petitioner was notified, that the mail service on said route would be discontinued on and after September 30, 1908, and that he would be allowed one month's extra pay.* The said contract was

accordingly terminated on the date last above mentioned.

10. That the mail service in the region covered by route No. 78108 was not discontinued, except as to that part between Chicken and the junction of the Chistochina and the Copper Rivers, a distance of 190 miles, and that the remainder of said region was covered by other routes during the remainder of said term.

11. That the contract was terminated without the consent of the petitioner, and that the Postmaster General failed to advertise that proposals would be received for changes in the terms of such contract, in accordance with section 3958, Revised Statutes, concerning changes in contracts.

12. That the following damages were sustained:

Loss of profits which would have accrued during the remaining portion of the four-year term	$40,936
Loss of buildings	5,000
Loss of horse feed	5,800
Total	51,736

(*a*) The petition does not allege that in discontinuing the contract entered into with appellant the Postmaster General was guilty of an act so arbitrary or capricious as to impute bad faith;

(*b*) Or that the appellant did not have full knowledge of the conditions in Alaska when he entered into the contract;

(*c*) Or that there was any ambiguity in the contract, or any facts upon which ambiguity could be predicated;

(*d*) Or that the Postmaster General called for an increase of service, or that there was any service rendered on the part of appellant in carrying the mails beyond that covered by the contract.

II.

ARGUMENT.

In the Court of Claims appellee demurred to the petition on the ground that it did not state a cause of action, and in reply to the brief and argument of appellee the appellant argued in support of his petition briefly—

(*a*) That the entire contract, the circumstances surrounding the signing and executing of same, and the physical conditions to which the contract was to be applied, should all be taken into consideration in interpreting the contract.

(*b*) That the discontinuance stipulation should not be construed to apply to a case in which the payment of one month's extra pay would be grossly inadequate as compensation to the contractor.

(*c*) That the Postmaster General was chargeable with an arbitrary, capricious, and unreasonable exercise of power in discontinuing the contract.

(*d*) That regulation 1277 of the Post Office Department having been promulgated in 1893 and before the mail route 78108 was in existence is of no importance and would not control the contract herein, drawn in 1906.

(*e*) That the measure of damages includes the loss of profits and the loss of property.

We shall answer these contentions upon the general proposition that no breach of contract on the part of the United States is alleged in the petition. In our argument we shall particularize under three main heads as follows:

First. The terms of the contract gave the Postmaster General authority to terminate it.

Second. The regulations of the Post Office Department applying to this route gave the Postmaster General authority to discontinue the contract.

Third. The petition does not allege facts upon which damages may be based.

FIRST.

The terms of the contract gave the Postmaster General authority to terminate it.

(*a*) By the terms of the contract (Rec., p. 4) the Postmaster General could—

> discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with. * * *

In substance, the contention of appellant is that the foregoing clause does not govern in this contract, for the reason that the expenses incident to the

carrying of the mails over the route in question were so great that "one month's extra pay" would not be a full indemnity in the event that the contract was discontinued. Appellant urges that this is true, because up to the time of the discontinuance he had spent a great deal more money in the purchase of equipment and the construction of roads than he would have needed to expend from the time of discontinuance to the end of the contract period. Is this any reason for eliminating the binding force of the above quoted clause? Appellant was under no mental disability when making the contract. He does not allege any ambiguity in the wording of this clause, and could not, for the reason that the same is obviously most clear and explicit. In fact appellant's counsel says in his petition (Rec., p. 12):

> Such difficulties and hardships as these were encountered constantly each year. *The foregoing facts and the physical and climatic conditions were matters of common knowledge in that part of Alaska and were known to the agents of the Post Office Department.*

If they were a matter of common knowledge, is not this common knowledge imputable to him? How then can appellant escape the terms of the contract in question, and what does it avail him to encumber his petition with recitals about the hardships incident to carrying the mails over the route in question?

In the case of *Lord* v. *Pomona Land & Water Co.* (153 U. S., 576 and 577) the court said:

> If the language is clear and unambiguous, it must be taken according to its plain meaning as expressive of the intention of the parties, and, under settled principles of judicial decision, should not be controlled by the supposed inconvenience or hardship that may follow such construction.

(*b*) Counsel for appellant charges in his brief, page 24, that the Postmaster General was guilty of "arbitrary or capricious or unreasonable exercise of power" without proper regard to the damage done the contractor. With a full consciousness of the liberality extended to those pleading their causes in the Court of Claims, we suggest, however, to this honorable court that there is grave doubt in our minds whether there is any allegation in the petition under the contract upon which the claim is based charging the Postmaster General with being arbitrary, capricious, or unreasonable.

It is true that in his petition (page 8 of the record) he says:

> * * * the contract was performed to the satisfaction of the Government until the service was arbitrarily, capriciously, and erroneously discontinued by the Postmaster General.

It seems to us that the charge contained in this quotation can only be applied to the contract between Crittenden and the Government, and not to the contract between appellant and the Government. A

perusal of the petition shows that there were incorporated in it two contracts. The first one was that between Crittenden and the Government. Crittenden was unable to carry out the contract, so he entered into an agreement with appellant to take the contract off his hands. The Postmaster General consented that appellant should take the place of Crittenden. Did there not then arise a contract between the Government and Miller, and does not the claim grow out of the Miller contract?

If our view of the petition is correct, any arbitrary, capricious, or erroneous conduct on the part of the Postmaster General with respect to the contract that Crittenden had is irrelevant.

However, let us suppose that this charge of arbitrary, capricious, or unreasonable conduct is made respecting the contract in question in this suit, i. e., that between Miller and the United States. Are not the teeth drawn from this charge by reason of the fact that there is *no bad faith imputed* to the Postmaster General in discontinuing the contract?

On page 24 of appellant's brief, he says:

> Bad faith is not charged here against the Postmaster General.

Now, in order to come within the decisions of this court, the action of the Postmaster General must carry with it the implication of bad faith and bad faith must be explicitly pleaded. In other words, actual or constructive bad faith must be alleged. We have seen, however, that the Postmaster General had

clear and unquestionable authority to declare the contract ended. He might have "arbitrarily" discontinued the service without implying bad faith on his part. The Revised Statutes, section 1277, gives him such power. It was not necessary to the proper exercise of this power that he should hear any protest or argument by the contractor, or that he should apprise him of the operations of his mind in reaching the conclusion that the public interest required the discontinuance of the service. He might have acted "capriciously," under any of the ordinary meanings of that word, without bad faith necessarily being implied thereby. He might even have acted "erroneously" without being guilty of bad faith. If error was committed, or, if the Postmaster General's determination was marked by caprice, it must have been so gross and palpable as to leave no other inference than that he was intentionally, consciously, and willfully unjust, unfair, and biased in his action. If he was empowered to annul the contract, is not the fact that he acted in a manner implying bad faith the only thing that can vitiate his act? The authorities hold that bad faith must be alleged. (Hudson on building contracts, pp. 580, 596–598; *Kihlberg* v. *U. S.*, 97 U. S., 398; *R. R. Co.* v. *March*, 114 U. S., 549–553; *R. R. Co.* v. *Price*, 138 U. S., 185–195; *Gleason et al.* v. *U. S.*, 175 U. S., 588.)

Since it is not alleged or claimed that there was actual or constructive bad faith on the part of the Postmaster General, it would appear to us by the

authorities from which we hereinafter quote that the point raised, i. e., the charge of capricious or unreasonable conduct on the part of the Postmaster General would not vitiate the act of the Postmaster General.

In the case of *The United States* v. *Gleason* (175 U. S., 588–607) Mr. Justice Harlan, in rendering the opinion, says:

> The fallacy, as we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer, and to revise his action by the views of the court. This, we have seen, could only be done *upon allegation* and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. But in this case we find neither allegation nor proof.

It will be noted on examination of this case that the plaintiffs actually charged that the act of the engineer in refusing to extend the time of the contract was "wrongful and unjust." The opinion, however, holds that such language is not sufficient.

In the case of *McLaughlin* v. *The United States* (37 C. Cls., 150–190) the court says:

> The complaints of mismanagement relate to changes in the plans and the methods adopted for the inspection of work and material. These complaints involve charges against the architect or his assistant, and really constitute the gravamen of this entire proceeding.

> Under the rules stated ante, fraud or failure to exercise an honest judgment must appear in the conduct of the officer involved. The burden of proof is upon plaintiffs to establish such fraud or dishonesty.
>
> The contract is free from ambiguity as to the right of the Government to make changes and to direct inspection of work and material. It is surprising that charges so grave as those directed against the architects should not appear by specific allegation of fraud or mistake in the pleading. The petition contains a general charge of "mismanagement and delays on the part of defendants," but does not specify a single act of mismanagement except in the most general terms.

(*c*) The language of the contract making one month's extra pay "full indemnity" for all losses sustained by the contractor on account of the contract being terminated, is too clear for argument.

Probably the leading case governing the case at bar, and the one upon which we rely most strongly, is that of *Slavens* v. *United States* (196 U. S., 229; 38 C. Cls., 574).

The facts of this case were—

Slavens entered into a contract with the department for transporting the mails in Boston, Brooklyn, and Omaha. During the terms of the Boston and Brooklyn contracts the Postmaster General determined to carry certain of the mails on the electric street railway lines. The Postmaster General terminated the Boston and Brooklyn contracts, and

afterwards relet the same, at a lesser rate, to another contractor for the remaining portion of the period. The contracts in the Slavens case contained the same provision as to discontinuing the service as is contained in the contract in the case now under consideration.

In this case Mr. Justice Day, speaking for the court, said:

> It is contended by the appellant that this contract, properly construed, while it permits the Postmaster General to make changes in the schedule and termini of the route, to reduce the same, to increase, decrease, or extend the service, without change of pay, does not confer the right to cancel the contract except upon abandoning the entire service, which may be done with the allowance of one month's extra pay to the contractor. But it is insisted, so long as any part of the service remains to be performed, it is not within the power of the Postmaster General to put an end to the service of the contractor and relet a part of it to another, substituting a different character of service for a part of the field theretofore covered by the contract. In other words, it is contended that the total discontinuance of the service, which can only terminate the contract, must not leave any service to be performed in the district covered.
>
> We can not accede to this narrow construction of the powers given the Postmaster General by the terms of this contract. He is given general power to increase, decrease, or extend the service contracted for, without change of

pay. Furthermore, whenever the public interests in his judgment require it he may discontinue the entire service. We think the advertisement and the regulations under which this contract was made and the contract as entered into were intended to permit the Postmaster General, when in his judgment the public interest requires it, to terminate the contract, and if a service of a different character has become necessary in his opinion to put an end to the former service upon the stipulated indemnity of one month's extra pay being given to the contractor.

* * * * *

The authority given to the Postmaster General is broad and comprehensive, requiring him to exercise his judgment to end the service, and thereby terminate the contract, whenever the public interest shall demand such a change. In that event the contractor takes the risk that the exercise of this authority might leave him only the indemnity stipulated for—one month's extra pay (pp. 233 and 234).

Is not the foregoing opinion conclusive in the case at bar? But appellant would have us believe that the distinction between the *Slavens case* and the one at bar is that in the former the contractor was offered the privilege of continuing the contract at the reduced service, and refused to do so. Thus, the Postmaster General was relieved of the onus of capricious exercise of power, whereas in the case at bar the appellant did not have an opportunity or was not offered the privilege of continuing the contract at a

reduced price, and so the Postmaster General could be charged with a capricious exercise of power. But the weakness in this argument, as we have already pointed out, is that the simple charge of arbitrary or capricious exercise of power in discontinuing the contract does not differentiate this case, because bad faith is not charged in any place in the petition. Furthermore, his contention is immaterial, for the rights of the parties in this contract must be determined by its terms *only*, and the contract in the case at bar is silent about offering appellant the privilege of continuing the contract at a lesser rate.

It may not be inappropriate to call the attention of the court here to the fact that in the *Slavens case supra* appellant contended that the provisions of section 817 of the postal laws providing for discontinuance applied particularly to star route and steamboat service, such as the one there under consideration, but the court held on page 236 that—

> * * * the provisions of law are broad and comprehensive, and not limited by the terms of the act to such specific service * * *.

Again, the court has also held in the case of *Garfielde* v. *The United States* (93 U. S., 242) that not only does the Postmaster General have the power, under a contract similar to the one in the case at bar, to terminate the contract in his discretion and to remit one month's pay additional as indemnity, but that the United States is bounden to a claimant to pay the one month's pay after a contract has once been entered into.

Mr. Justice Hunt, delivering the opinion of the court, said:

> * * * The claimant states, in his proposal, that he has full knowledge of the laws and regulations of the department on the subject of mail transportation. He no doubt knew that this regulation provided that the Postmaster General could discontinue entirely the service for which he proposed, whenever in his judgment, the public interests required it, and that for such discontinuance one month's pay was to be deemed a full indemnity to the contractor. There was reserved to the Postmaster General the power to annul the contract when his judgment advised that it should be done, and the compensation to the contractor was specified. An indemnity agreed upon as the amount to be paid for canceling a contract must, we think, afford the measure of damages for illegally refusing to award it.

Appellant relies very largely upon the case of *United States* v. *Utah, Nevada and California Stage Company* (199 U. S., 414). There is, however, a marked difference between that case and the case at bar. The distinction grows out of the fact that in the *Utah, Nevada, and California Stage Company* case the Postmaster General called for an extension of service, whereas there is no allegation in the case at bar that appellant was called upon or performed additional service other than such service as it was commonly known would be required under conditions existing in Alaska. In the *Stage Company case* the action grew

out of a contract for mail service covering a period of four years in New York City. After the execution of the contract, Congress established a new distributing station and orders were issued from the post office from time to time creating new mail stations. As a result appellant was compelled to increase the number of wagons over and above the normal increase. The distance to be traveled by the wagons was extended over more than 300,000 miles during the period from October, 1893, to February, 1895. Thus, the conditions originally contracted for were changed by the action of Congress and the department. In the *Stage Company case* the court held in substance that the new or additional mail or transfer service which the contractor was required to perform under authority of the Postmaster General without additional compensation did not include the vast amount of additional work resulting from the opening of the new post office and not within the common knowledge of or contemplated by either of the parties when the contract was made. The court further held that the contractor had the right to presume that the Government knew how many stations would be served, and where the proposals positively specified that only two elevated-railroad stations were to be served, the contractor was entitled to extra compensation for serving four stations, notwithstanding the proposals required bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes.

We submit that this rather extended recital of the facts in this case upon which appellant relies shows a distinct line of cleavage between it and the case at bar.

In the case of *Wreford* v. *United States* (32 C. Cls., 415) the court, in its opinion, discusses in a very illuminating way the question of the measure of damages being one month's extra pay, where the Postmaster General terminates a contract under powers given him thereby.

We summarize our first point, then, as follows:

(1) There being no ambiguity in the wording of the contract, and—

(2) Appellant according to his own admission being charged with knowledge of the physical conditions of the country for whose mail service he was contracting, and—

(3) There being no bad faith charged to the Postmaster General on account of his discontinuing the contract, and—

(4) The Postmaster General having authority, under the terms of the contract and the decisions of the Supreme Court interpreting a similar contract, to discontinue the same,

The Postmaster General did not commit a breach of the contract when the same was discontinued by him.

SECOND.

The regulations of the Post Office Department applying to this route gave the Postmaster General authority to discontinue the contract.

We shall discuss appellant's contention that regulation 817 did not apply to Route No. 78108. This regulation, found on page 6 of the record, is as follows:

> The Postmaster General may discontinue or curtail the service *on any route, in whole or in part*, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor *one month's extra pay* on the amount of service dispensed with and a pro rata compensation for the amount of service retained and continued.

On page 7 of the record appellant declares that—

> The regulation * * * was not drawn and promulgated with reference to the conditions existing in Alaska on route No. 78108 during the period covered by the contract sued on, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the hereafter-described conditions existing in that part of Alaska covered by the contract sued on.

We might object to this statement being in the petition, because—

(1) It is a most extraordinary bit of argument;

(2) It is a conclusion of the pleader and wholly contradictory to the terms of the contract, which is also a part of the petition.

(3) It is in contradiction to the laws and regulations of the department which govern all contracts and which are made a part of the petition.

However, we are informed by appellant that this regulation does not control, for it was promulgated 13 years previous to the letting of the contract for the carrying of the mails over this route and many years previous to the opening up of this road, and therefore the makers of this regulation could not have had in contemplation conditions such as were found on this route. Appellant was presumed to know the laws and regulations of the department, and this regulation was one of the laws of the department at the time the contract was entered into.

Furthermore, the laws and regulations which govern the carrying of the mails are general in their nature according to the opinion in the case of *Slavens*, *supra*, and apply to all sections of the United States and to all conditions, whether they be favorable or unfavorable.

Again, section 1261 of the postal laws and regulations in force at the time the contract was executed would, by its terms, foreclose the contention of appellant that the regulation in question heretofore quoted

did not apply to this case because of the unusual hardships. The section is as follows:

> Bidders for mail service must inform themselves of and consider the weight of the mail, the likelihood of its increase, the fact that foreign as well as domestic mails, and also post-office supplies, must be carried; *the condition of roads, hills, streams, etc., also whether there be toll bridges, ferries, or obstructions of any kind increasing the cost of service.* No claim for extra pay can be allowed for alleged mistakes or misapprehension as to the degree of service, nor for increased distance by reason of destruction of bridges, discontinuance of ferries, or other obstructions occurring during the contract term * * *.

If, therefore, the conditions of the country were matters of common knowledge, R., p. 12, and by section 1261 of the Postal Laws and Regulations a contractor was ordered to *inform* himself of the conditions surrounding the performance of the terms of the contemplated contract, and if the contention of appellant that the regulation in question does not apply in this case is wholly inconsistent with the terms of the contract which is clear and explicit, we submit that the Postmaster General, in discontinuing service over this route, was acting within the regulations of the Post Office Department as well as within the terms of the contract.

We submit that the cases which we have already quoted from or cited under our "First" point apply also with respect to the questions considered under our "Second" heading. We shall therefore not repeat them.

THIRD.

Does the petition allege facts upon which damages may be assessed?

Admitting for the sake of the argument only that the petition states a cause of action, has not the pleader failed to lay a foundation upon which damages may be estimated?

On page 25 of the petition, appellant, emerging from a maze of argument and conclusions, sets forth the following statement:

Disbursements on account of labor, feed, expenses on the route, including expenses of maintaining stations, etc	$110,040.03
Disbursements on account of Scott & Frase, subcontractors	41,129.52
Total disbursements	151,169.55
Total receipts from the Post Office Department	102,572.41
Total losses	48,597.14

The point we suggest here is, that there being no allegation in the petition that the expenditures made were reasonable expenditures and there being no allowance for materials or property on hand, it would be impossible to distinguish the proper expenditures or the speculative profits. For example, we call the court's attention to the following, appearing at bottom of page 23 of the petition (R., p. 14):

> About $1,000 worth of trail and bridge work between Tanana Crossing and Eagle had been done to shorten the winter route and give good service. It was necessary to do all these

> things that the contract might be performed, as the Government did not make allowance for delays whether caused by snows, storms, blizzards, the freeze-up in the fall, the break-up in the spring, or any other consideration, but fines were charged at every opportunity.

There is no allegation that this expenditure was *necessary* in the actual performance of the contract, nor is there any allegation that the amount expended was a reasonable one. The expenditures in the last quoted clause were made in order to escape paying fines. The amount expended might have been out of all proportion to the work done or the consideration received by appellant in return therefor. The money may have been expended with gross carelessness, and the only argument which counsel makes with respect to such expenditures was that they were made in order to avoid penalties.

On page 23 of the petition appellant alleges that he purchased $5,000 worth of horse feed. He does not allege that the price paid was a reasonable one, nor does he give credit for the value of that which he had on hand when the contract was terminated.

So then, we submit that before the amount of the contemplated profits can be found, it must be known what the reasonable expenditures were, and if the petition does not allege that the expenditures made were reasonable, how can it be known that they were reasonable and necessary, and if they were not reasonable and necessary, then how can we have any basis upon which to figure the difference between

the expenditures and the amount to be paid on the entire contract, which would be the profits?

Again, it is *argued* in the petition that the heavy expenditures came in the early part of the contract and prior to the time of the discontinuance of the contract by the Postmaster General, but that expenditures subsequent to the discontinuance would be very small, because things for which it was necessary to make expenditure had already been bought or built. Considering appellant's future in the light of his past it was certainly within the range of possibility that unexpected things could happen in the way of storms, spring floods, washed out trails, and loss of animals, which would cut down prospective profits. The point we make here is that an argumentative conclusion is not a sound basis on which to determine damages, as it is altogether too speculative.

We invite the court's attention to the case of *United States* v. *Behan* (110 U. S., 338, 340, 342–346).

In this case the contractor entered into a contract with the United States Army to make certain improvements in the harbor of New Orleans. The claimant was on the contractor's bond. The contract was annulled by the Government engineer before the work was completed, and after the contractor had expended large sums of money in providing machinery, materials, and labor for filling the contract. Action was brought by the bondsman.

We submit that this case is similar in fact to the case at bar, and explanatory of the manner of alleging damages and prospective profits.

CONCLUSION.

We respectfully submit, therefore, by way of conclusion, that the contract and the laws and regulations of the Post Office Department gave the Postmaster General the authority to terminate the contract in question; that in terminating it he acted within his rights and was not guilty of bad faith, nor of capricious exercise of power equivalent to bad faith; and finally, that although facts in the petition might otherwise state a cause of action, there are no facts alleged upon which damages could be estimated.

HUSTON THOMPSON,
Assistant Attorney General.